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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1128

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA
Respondents,

v.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTAD, EARL L. SHERROW, JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
TREATIES AND STATUTES INVOLVED	4
STATEMENT OF THE CASE	6
REASONS FOR GRANTING CERTIORARI	10
1. The Lower Court's Ruling Is Inconsistent with Controlling Case Law and Violates the "Equal Footing" Doctrine Establishing Ownership of Navigable Bodies of Water in the Various States	10
2. The Lower Court's Decision Conflicts with this Court's Recent Holding in *Wilson v. Omaha Indian Tribe*, _____U. S._____, 61 L.Ed.2d 153 (1979)	17
3. The Court's Decision Extending Indian Control over Non-Indian Fee Lands Is in Direct Conflict with the Principles Enunciated in *Oliphant v. Suquamish Indian Tribe* and the Provisions of 18 U.S.C. § 1165	19
4. The Lower Court's Approval of the Tribe's Summary and Arbitrary Regulation of a Non-Member Fee Owner's Hunting and Fishing Privilege Shocks the Conscience and Violates the Fifth Amendment to the United States Constitution	23
5. The Lower Court's Decision Approving Resolution 74-05 Violates the Indian Civil Rights Act	27
6. The Lower Court's Decision Violates Rule 52(a), Federal Rules of Civil Procedure	28
CONCLUSION	30

TABLE OF AUTHORITIES

Table of Cases II
Table of Statutes IV
Table of Treaties V
Table of Constitutional Amendments V
Miscellaneous Citations V

TABLE OF CASES

CASES:	Page
Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918)	29
Antler v. Land Co. of Wyola, 507 F.2d 940 (9th Cir., 1974), 421 U.S. 992	21
Atlantic & Pacific Rr. Co. v. Mingus, 165 U.S. 413 (1897)	14
Baldwin v. Montana Fish & Game Com'n, 436 U.S. 371 (1978)	24, 25
Bates v. Clark, 95 U.S. 203 (1877)	20
Beaver v. United States, 350 F.2d 4 (9th Cir., 1965), cert. den. 382 U.S. 937 (1966)	29
Berry v. Arapahoe & Shoeshone Tribes, 420 F.Supp. 934 (D. Wyo., 1976)	28
Brewer-Elliot Oil & Gas Co. v. United States, 260 U.S. 77 (1922)	18
C. F. Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702 (1921)	19
Caminetti v. U.S., 242 U.S. 470 (1917)	21
Chemehueui Tribe v. F.P.C., 420 U.S. 395 (1975)	21
Choctaw & Chickasaw Nations v. Board of County Commissioners, 361 F.2d 932 (10th Cir., 1966)	18
Choctaw & Chickasaw Nations v. Seay, 235 F.2d 30 (10th Cir., 1956)	18
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1969)	12, 13, 14, 17
Clairmont v. United States, 225 U.S. 551 (1911)	20
Colliflower v. Garland, 342 F.2d 369 (9th Cir., 1965)	26
Crow Nation v. United States, 284 F.2d 351 (Ct.Cl., 1960)	6
Crow Nation v. United States, 81 Ct.Cl. 238 (1935)	6
Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977)	23, 24
Draper v. United States, 164 U.S. 240 (1896)	20
Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (C.A. 10th, 1975)	28
Ex Parte Crow Dog, 109 U.S. 556 (1883)	20
Fawcette v. Dewey Lumber Co., 82 Mont. 250, 266 P. 646 (1928)	19
General Electric Co. v. Gilbert, 429 U.S. 125 (1976)	22
Gibson v. Kelly, 15 Mont. 417, 39 P. 517 (1895)	19
Graham v. Richardson, 403 U.S. 365 (1971)	24
Hardin v. Jordan, 140 U.S. 371 (1891)	23
Hardin v. Shedd, 190 U.S. 508 (1902)	18
Herrin v. Sutherland, 74 Mont. 587, 241 P. 328 (1925)	23, 24
Herron v. Choctaw & Chickasaw Nations, 228 F.2d 830 (10th Cir., 1956)	18
Holyoke Co. v. Lyman, 15 Wall. 500 (1873)	23
Hughes v. Oklahoma, ___U.S.___, 60 L.Ed 2d 250 (1979)	23, 25
Martin v. Waddell, 41 U.S. 366 (1842)	11, 28

CASES: Page

McClanahan v. Arizona Tax Court, 411 U.S. 164 (1973) 21
Minnesota v. Hitchcock, 187 U.S. 373 (1902) 14, 15
Oklahoma v. Texas, 256 U.S. 547 (1922) 18
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1979) 3, 11, 19, 20, 22, 24, 25, 27, 28
Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 21
Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 15, 16
Packer v. Bird, 137 U.S. 661 (1891) 10, 18, 21
Perry v. Commerce Loan Co., 383 U.S. 392 (1966) 21
Pollard's Lessee v. Hagan, 3 How. 212 (1845) 16
Puyallup Tribe, Inc. v. Washington Game Department, 433 U.S. 165 (1977) 13, 28, 29
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 13, 28
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 25, 26, 27
Schneider v. Rusk, 377 U.S. 163 (1964) 25
Settler v. Yakima Tribal Court, 410 F.2d 486 (9th Cir., 1969) cert. den. 398 U.S. 903 (1970) 25, 26
Shapiro v. Thompson, 394 U.S. 618 (1969) 25
Shiveley v. Bowlby, 152 U.S. 1 (1894) 10, 11, 12, 18
Shore v. Shell Petroleum Corp., 55 F.2d 696, aff'd 60 F.2d 1 (10th Cir., 1932) 18
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 22
Skokomish Indian Tribe v. France, 320 F.2d 205 (9th Cir., 1963) 28, 29
United States v. Champlin Refining Co., 156 F.2d 769 (10th Cir., 1946), aff'd 331 U.S. 788 (1947) 18
United States v. Elliott, 131 F.2d 720 (10th Cir., 1942) 18
United States v. Finch, 395 F.Supp. 205 (D. Mont., 1975) 7
United States v. Finch, 548 F.2d 822 (9th Cir., 1976) vacated 433 U.S. 676 (1977) 2, 7, 9, 10, 11, 12, 17, 29
United States v. Hayes, 20 F.2d 873 (8th Cir., 1927) cert. den. 275 U.S. 555 18
United States v. Heinrich, 12 F.2d 938 (D. Mont., 1926) 18
United States v. Holt State Bank, 270 U.S. 49 (1926) 10, 11, 12, 13, 14, 15
United States v. National Association of Real Estate Boards, 339 U.S. 485 (1950) 30
United States v. Oklahoma Gas & Electric Co., 318 U.S. 206 (1942) 18
United States v. Oregon, 295 U.S. 1 (1935) 11, 18

CASES: Page

United States v. Oregon State Medical Society, 343 U.S. 326 (1952) 30
United States v. Standard Brewery, 251 U.S. 210 (1920). 21
United States v. State of Montana, 457 F.Supp. 599 (D. Mont., 1978) 2, 9, 15, 17, 24, 27, 29
United States v. State of Montana, 604 F.2d 1162 (9th Cir., 1979) 2, 6, 9, 20
United States v. Wheeler, 435 U.S. 313 (1978) 27
United States v. Yellow Cab Co., 338 U.S. 338 (1949) 30
Ward v. Racehorse, 153 U.S. 504 (1895) 20
Washington v. Davis, 426 U.S. 229 (1976) 25
Whitaker v. McBride, 197 U.S. 510 (1904) 18
Wilson v. Omaha Indian Tribe, _____U.S._____, 61 L.Ed. 2d 153 (1979) 3, 17, 18, 19, 23

TABLE OF STATUTES

1 Stat. 468, 43 U.S.C.§ 931, Act of May 18, 1796 12
2 Stat. 606, 33 U.S.C.%10, Act of March 3, 1811 12
13 Stat. 85, Act of May 26, 1864 11
22 Stat. 42, Act of April 11, 1882 14
22 Stat. 167, Act of July 10, 1882 14
24 Stat. 388, General Allotment Act of February 8, 1887 ..... 4, 8, 13, 25 28
25 Stat. 157, Act of June 4, 1888 14
25 Stat. 642, Act of January 14, 1889 13
25 Stat. 660, Act of February 12, 1889 14
25 Stat. 676, The Enabling Act of Montana, February 22, 1889 ..... 4, 5, 16, 20, 28
26 Stat. 989, Act of March 3, 1891 14
33 Stat. 352, Act of April 27, 1904 14
41 Stat. 751, Crow Allotment Act of June 4, 1920 ..... 4, 8, 14, 15, 25, 28
67 Stat. 588, Public Law 83-280 6
18 U.S.C.§1151 ..... 21, 22
18 U.S.C.§1165, 74 Stat. 860, Public Law 86-634, Act of July 12, 1960 ..... 3, 4, 7, 9, 19, 20, 21, 22, 25
25 U.S.C.§1302, 82 Stat. 77, Public Law 90-284, 202, The Indian Civil Rights Act, April 11, 1968 ..... 3, 5, 8, 27, 28
28 U.S.C.§1254(1) 3
Rule 52(a), Federal Rules of Civil Procedure 4, 5, 28, 29
70-16-201, Montana Code Annotated 19
70-2-111, Montana Code Annotated 23

TABLE OF TREATIES

	Page
2 Kapp. 754, Treaty with the Kiowa and Comanche, 1867	13
2 Kapp. 760, Treaty with the Cheyenne and Arapahoe, 1867	13
2 Kapp. 765, Treaty with the Utes	13
2 Kapp. 770, Treaty with the Sioux Bands, 1858	13, 17
2 Kapp. 782, Treaty with the Navaho	13
2 Kapp. 786, Treaty with the Shoshoni and Bannock, 1858	13
2 Kapp. 865, Treaty with the Klamath, Modoc and Snake Bands, 1864	13
2 Kapp. 887, Treaty with the Cheyenne and Arapahoe, 1865	13
2 Kapp. 892, Treaty with the Comanche and Kiowa, 1865	13
11 Stat. 749, Treaty of Fort Laramie, 1851	4, 6, 12
15 Stat. 649, Second Treaty of Fort Laramie, 1868	4, 6, 10, 12, 13, 14, 21, 22, 25, 28

TABLE OF CONSTITUTIONAL AMENDMENTS

	Page
Fourth Amendment to the United States Constitution	24
Fifth Amendment to the United States Constitution	3, 5, 8, 23, 25, 26
Fourteenth Amendment to the United States Constitution	24, 25

MISCELLANEOUS CITATIONS

	Page
78 I. D. 101 (1971)	23
Crow Tribe Resolution 74-05	6, 7, 8, 9, 22, 23, 24, 25, 26, 27 28

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, State of Montana and the Montana Fish and Game Commission, Big Horn Rod & Gun Club, and Citizens Rights Organization,[1] respectfully pray that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 12, 1979, and modified on September 20, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals in *United States v. State of Montana*, 604 F.2d 1162 (9th Cir. 1979), appears as Appendix A. The opinion of the United States District Court for the District of Montana, *United States v. State of Montana*, 457 F. Supp. 599 (D.Mont., 1978), appears at Appendix B. Because the Court of Appeals adopted its opinion in *U.S. v. Finch*, 548 F.2d 822 (9th Cir., 1976), vacated 433 U.S. 676 (1977), on the river ownership issue, that opinion appears at Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 12, 1979. A timely petition for rehearing was denied on September 20, 1979, and a timely application for an extension of time within which to file this Petition was granted,

[1] On October 25, 1976, the District Court granted two local organization, Big Horn Rod and Gun Club and Citizens' Rights Organization, petitions to intervene. Both organizations identified themselves with the State and their positions are congruent with Montana's. They have joined in this petition.

extending time to January 20, 1980. This court's jurisdiction is invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

1. Whether the mere establishment of an Indian reservation within the Territory of Montana, with the usual assurances to the Indians thereon of exclusive use and occupancy, divests the subsequently admitted State of its constitutional right under the equal footing doctrine to hold title to the beds of navigable waters within the reservation.

2. Whether this Court's recent decision, *Wilson v. Omaha Indian Tribe,* ____U.S.____ 61 L. Ed.2d 153 (1979), requires ownership of riparian land within an Indian reservation to be measured by reference to state law.

3. Whether, in light of 18 U.S.C., §1165, and *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1979), an Indian tribe has the power to regulate non-Indian hunting and fishing on non-Indian owned fee lands within a reservation.

4. Whether a tribal resolution proscribing hunting and fishing by all non-members within the boundaries of an Indian reservation, including owners of fee patented lands within the reservation and which is enforced by federal officers, is so summary and arbitrary as to shock the conscience and thus constitute a taking of property without due process or a denial of equal protection, contrary to the Fifth Amendment to the United States Constitution.

5. Whether a tribal resolution proscribing hunting and fishing by all non-members within the boundaries of an Indian reservation, including fee patented lands within the reservation, violates 25 U.S.C., §1302(8) of the Indian Civil Rights Act.

6. Whether under Rule 52(a), Federal Rules of Civil Procedure, the lower court was justified in setting aside, *sub silentio,* those trial court findings which are supported by substantial, credible evidence.

TREATIES AND STATUTES INVOLVED

The following treaties and statutes are reproduced as appendices:

(1) Treaty of Fort Laramie, 1851, 11 Stat. 749 (Appendix D);

(2) Second Treaty of Fort Laramie, 1868, 15 Stat. 649 (Appendix E);

(3) General Allotment Act of February 8, 1887, 24 Stat. 388 (Appendix F);

(4) Crow Allotment Act of June 4, 1920, 41 Stat. 751 (Appendix G).

Other statutes and constitutional provisions involved are:

(1) Act of July 12, 1960, Public Law 86-634, 74 Stat. 869, 18 U.S.C., §1165, which provides:

> "Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited."

(2) The Enabling Act of Montana, February 22,

1889, 25 Stat. 676, which in pertinent part provides:

"An Act * * * to enable the people of * * * Montana * * * to be admitted into the Union on an equal footing with the original states * * *.

§4. * * * Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, * * *."

(3) The Fifth Amendment to the United States Constitution which in pertinant part provides:

"No person shall be * * * deprived of life, liberty or property, without due process of law."

(4) The Indian Civil Rights Act, Act of April 11, 1968, Public Law 90-284, §202, 82 Stat. 77, 25 U.S.C.§1302, which in pertinent part provides:

"No Indian tribe in exercising powers of self-government shall***

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; * * *."

(5) Rule 52(a), Federal Rules of Civil Procedure, which in pertinent part provides:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall

find the facts specially and state separately its conclusions of law thereon, * * *. Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

STATEMENT OF THE CASE

On October 13, 1973, the Crow Tribal Council passed Resolution 74-05, which proscribes hunting and fishing within the Crow Indian Reservation[2] by all non-members of the Crow Tribe, despite the fact that approximately 30 percent of the land within the reservation is owned in fee and approximately 43 percent of reservation residents are non-Indians. Because there are non-members who either reside on or who travel into the reservation, Montana continues to require such non-members to possess state hunting and fishing licenses and enforces, as against such non-members, all state fish and game statutes and regulations, including bag limits, seasons, and hours. However, Montana does not attempt to enforce any of its fish and game laws against tribal members, and it has consistently admitted that it has no jurisdiction over Indian hunting and fishing activities *within the reservation.*[3]

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[2] Resolution 74-05 is reproduced as Appendix H. The Crow Indian Reservation was first created by the Treaty of Fort Laramie of 1851, 11 Stat. 749. *The Crow Nation v. United States*, 284 F.2d 351 (Ct. Cl., 1960); the *Crow Nation v. United States*, 81 Ct.Cl. 238, 248 (1935). In 1868, it was diminished by the Second Treaty of Fort Laramie, 15 Stat. 649. By subsequent legislative acts, the reservation was further diminished to its present size of 2,282,764 acres. 604 F.2d, *supra*, at 1164 (Appendix A, p. 5).

[3] Montana did not choose to include the Crow Indian Reservation within jurisdiction granted it by Public Law 83-280, 67 Stat. 588, as amended. And the Crow Tribe has not requested the State to accept jurisdiction.

Non-Indians continued to assert their rights to hunt and fish free from Indian interference on fee lands within the reservation after Resolution 74-05 passed. This right was first challenged in 1974, when James Junior Finch was arrested while fishing in the Big Horn River from the banks of riparian land owned by the State of Montana and managed by the Department of Fish and Game for its citizens. He was charged with violating 18 U.S.C., §1165.

Finch was tried in District Court, and the criminal complaint was dismissed on the grounds that the bed of the Big Horn River was owned by Montana, and therefore, there was no violation of 18 U.S.C., §1165. *United States v. Finch*, 395 F.Supp. 205, 213 (D.Mont., 1975).

The United States appealed, and the Circuit Court reversed. On appeal, Finch contended that jeopardy had attached, and therefore, reversal and retrial were precluded. Finch continued to assert that the State owned the Big Horn River. The Circuit Court rejected Finch's double jeopardy argument and held that the Big Horn River, a navigable stream, was held in trust by the United States for the exclusive use and benefit of the Crow Indians. *United States v. Finch*, 548 F.2d 822 (Appendix C).

This court granted Finch certiorari, vacated the Circuit Court's judgment and remanded to that court with directions that the appeal be dismissed. *Finch, supra*, 433 U.S. at 677. Dismissal was granted on the grounds that jeopardy had attached when the information was dismissed. This court did not reach the question of river ownership.

The present action was initiated by the United States on October 9, 1975, to "parallel" the *Finch*

case.[4] The Crow Tribe was permitted to intervene. Their respective complaints sought to quiet title to the Big Horn River in the United States for the use and benefit of the Tribe; enjoin the State from licensing or regulating non-Indian hunting and fishing activities within the reservation; and for a declaration that the Tribe and the United States have sole authority to regulate hunting and fishing within the reservation.

Other issues raised by the parties and incorporated in the pre-trial order were: (1) Whether title to land riparian to the Big Horn River extends to low or high-water mark;[5] (2) whether fee patents to land within the reservation, without reservations or exceptions, and authorized by the Allotment Act of 1887,[6] and the Crow Allotment Act of 1920,[7] conveyed hunting and fishing privileges on or from the land conveyed;[8] (3) whether Resolution 74-05 constituted a taking of property without due process of law in violation of the Fifth Amendment to the United States Constitution and/or deprives non-Indians of equal protection of the law guaranteed by the Fifth Amendment;[9] (4) whether Resolution 74-05 violated the equal protection and due process guarantees of the Indian Civil Rights Act.[10]

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[4] United States' Brief to Ninth Circuit, p. 5.

[5] Appendix I, addendum to pre-trial order, paragraph 2.

[6] Appendix F.

[7] Appendix G.

[8] Appendix I addendum to pre-trial order, paragraphs 6 and 7.

[9] Appendix I, paragraph 8.

[10] Appendix I, paragraph 8.

After trial, the District Court held: (1) That the State of Montana owned the bed and banks of the Big Horn River to high-water mark; (2) that the State has exclusive authority to regulate non-Indian hunting and fishing activities on the Big Horn River and on all non-Indian fee land within the reservation; (3) that the United States has concurrent authority to regulate non-Indian hunting and fishing on tribal or Indian lands pursuant to 18 U.S.C., §1165; (4) that the Tribe possesses exclusive hunting and fishing rights only to those lands described in 18 U.S.C., §1165; and (5) that the Tribe retains the right to grant or deny hunting, fishing, and trespass privileges to non-Indians only on tribal or Indian lands. *United States v. State of Montana, supra,* 457 F.Supp. at 611 (Appendix B, at pp. 54-55).

The Circuit Court reversed and held, adopting its decision in *Finch, supra,* although recognizing the "issue is a close one * * * that within the exterior boundaries of the reservation" the United States holds title to the Big Horn River in trust for the Crow Tribe. 604 F.2d at 1166 (Appendix A, at p. 7).

The Circuit Court also held (1) that Resolution 74-05 was "a valid exercise of tribal power, except insofar as it attempts to proscribe all hunting and fishing" by non-members who reside upon fee lands within the reservation[11]; that the Tribe has the power to regulate hunting and fishing by non-members within the reservation, including its total proscription if not within the exception noted in (1), *supra*[12]; and (3) that the State of Montana has concurrent authority to regulate non-Indian hunting and fishing activities within the reservation so long as it does

[11] 604 F.2d 1165-1166 (Appendix A, pp. 7-8).

[12] 604 F.2d 1165 (Appendix A, p. 7).

not regulate indirectly hunting and fishing by tribal members, and such regulations have as their purpose "the conservation and proper management of game and fish" and do not impede proper tribal regulations.[13]

REASONS FOR GRANTING CERTIORARI

1. THE LOWER COURT'S RULING IS INCONSISTENT WITH CONTROLLING CASE LAW AND VIOLATES THE "EQUAL FOOTING" DOCTRINE ESTABLISHING OWNERSHIP OF NAVIGABLE BODIES OF WATER IN THE VARIOUS STATES.

As this Court has observed, Congress has constantly acted upon the theory that navigable waters and the soils under them:

> "* * * shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States * * *." *Shiveley v. Bowlby,* 152 U.S. 1, 49-50 (1894)

See also *Packer v. Bird,* 137 U.S. 661, 672 (1891). A disposal of lands underlying navigable waters during the territorial period is:

> "* * * not lightly to be inferred, and should not be regarded as intended unless the intention was *definitely declared or otherwise made very plain.*" *United States v. Holt State Bank,* 270 U.S. 49, 55 (1926) (Emphasis supplied.)

In the present case, the court below, adopting its decision in *United States v. Finch, supra* (Appendix C), found a public exigency in the mere establishment of an Indian reservation within the limits of

[13] 604 F.2d at 1166 (Appendix A, p. 8).

the Montana Territory,[14] although this court had in 1842 — 26 years before the Second Treaty of Fort Laramie — already established the doctrine that navigable waters are owned by the respective states. *Martin v. Waddell*, 41 U.S. 366 (1842).[15] The lower court totally failed to recognize that the fundamental reason for investing states with title to navigable waters is because those waters are so intimately linked to sovereignty that a presumption will be indulged against their separation from sovereignty. *United States v. Oregon*, 295 U.S. 1, 14 (1935).[16]

Further, the lower court failed to recognize that in regard to disposal of lands by the United States, those lands which underly navigable rivers must be accorded a special attention or treatment not demanded for lands not so situated. *Shively v. Bowlby, supra*, and *United States v. Holt State Bank, supra*. Furthermore, the trust in favor of the states which had been imposed upon the federal ownership of lands underlying navigable rivers had been in place long before the Treaties of Fort Laramie. By adopting the rationale of *Finch*, the lower court did not even purport to find any "definitely declared" or "very plain" intent relating, specifically, to the bed of the navigable Big Horn. Rather, it purported to interpolate an intent from: (1) a history of negotiations that related to *all* the lands encompassed within the reservation boundaries

[14] The Montana Territory was created in 1864. Act of May 26, 1864, 13 Stat. 85.

[15] This court failed to find the requisite intent to divest a State of ownership of navigable waters even in the very broadly and comprehensively worded grants to the Duke of York. 41 U.S. at 370, 414.

[16] This court has recognized but two sovereigns: The United States and the individual states. *Oliphant v. Suquamish Tribe of Indians*, 435 U.S. 191, 211 (1978).

without any regard to whether or not a navigable river bed was involved and without the distinguishing history dealt with in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); and (2) a resolution of alleged doubtful language in favor of the Indians where no relevant language existed at all; and (3) from treaty language which had been placed in so many other contemporaneous treaties as to be justifiably regarded as stereotype.[17] Such an approach, it is submitted, ignores the fact that the Second Treaty of Fort Laramie expressly and implicitly divested the Crow Tribe of Sovereignty over non-Indians.[18] It also ignores the special protection accorded navigable streams within states by judicial pronouncement such as *Shively* and *Holt, supra*, and by congressional action relating to such streams generally and particularly those within the Louisiana Territory, which included the Big Horn River.[19] Thus, a divesting of the state's right to title was "lightly inferred" as opposed to being found as "definitely declared or made very plain." Once having said, as did the lower court here, that "the issue is a close one," then the constitutional presumption vesting Montana with title to navigable rivers should have been the deciding factor. See pages 15, *et seq*, post.

The court in *Finch*, in discussing the Crow treaty of 1851, noted that its terms "fall far short of constituting an express grant of all lands, including the beds of navigable streams." (Appendix C p. 71.) It then

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[17] See footnote 25, *post*.

[18] See Articles 1, 5 and 6, Second Treaty of Fort Laramie, Appendix E.

[19] Act of May 18, 1796, 1 Stat. 468, 43 U.S.C.§ 931; Act of March 3, 1811, 2 Stat. 606, 33 U.S.C. §10.

turned to the Treaty of 1868.[20] The court relied almost exclusively upon two portions of Article 2 of that treaty for its holding that title to the bed was conveyed therein. These provisions guaranteed the Tribe "absolute and undisturbed use and occupation" and that "no person, except those herein designated and authorized to do so * * * shall ever be permitted to pass over, settle upon, or reside in" the reservation.[21] This language was used in numerous other treaties with tribes such as the Navaho, Ute, Cheyenne, Sioux, Arapahoe, Kiowa, Comanche and Shoshoni.[22]

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[20] The court first noted that the purpose of the 1868 treaty was to reduce the size of the Tribe's territory, citing this as a similarily to the *Choctaw* case where treaties were entered into for the same purpose. The court ignored the fact that the treaties discussed in *Holt State Bank* were also for that purpose. *Holt State Bank, supra,* at 58.

[21] The Court also relied on Art. 11 of the treaty, setting forth the requirement for obtaining a future cession agreement from the Tribe, as showing that the United States "recognized the extensive ownership rights" of the Tribe. Similar recognition was shown in the *Holt State Bank* situation, in the Act of January 14, 1889, 25 Stat. 642, which required the Chippewas' consent to a cession. These provisions should be contrasted with the *Choctaw* situation where no future cession was contemplated. The provision for a future cession by the Tribe is thus a factor which places the present case in the category of *Holt State Bank* and many other reservations, rather than the exceptional situation of *Choctaw.*

[22] Treaty with the Navaho, 1868, 2 Kapp. 782; Treaty with the Utes, 1868, 2 Kapp. 765; Treaty with the Sioux Bands, 1858, 2 Kapp. 770; Treaty with the Shoshoni and Bannock, 1858, 2 Kapp. 786-787; Treaty with the Cheyenne and Arapahoe, 1867, 2 Kapp. 760, 761; Treaty with the Kiowa and Comanche, 1867, 2 Kapp. 754, 755. Language nearly identical to that found in Art. 2 of all of these treaties and the Crow treaty is also found in numerous other treaties. See *inter alia,* Treaty with the Klamath, Modoc and Snake Bands, 1864, 2 Kapp. 865; Treaty with the Cheyenne and Arapahoe, 1865, 2 Kapp. 887, 888; Treaty with the Comanche and Kiowa, 1865, 2 Kapp. 892, 893.

All of the 1867 and 1868 treaties cited above also contained the provision regarding future cessions, found in Art. 11 of the Crow treaty, on which the court below also relied. This provision was considered by this court in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), as it appeared in the 1868 Sioux treaty.

Such language is not indicative of the kind of exceptional public exigency that was involved in *Choctaw, supra.* It merely indicates the establishment of an Indian reservation, as was done in *Holt State Bank, supra.* Compare *Minnesota v. Hitchcock,* 187 U.S. 373, 389 (1902), (*Holt* reservation was "a reservation within the accepted meaning of the term") with *Atlantic & Pacific Rr. Co. v. Mingus,* 165 U.S. 413, 435-436 (1897), (*Choctaw* reservation was "for most purposes * * * to be considered as an independent country"). In *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1969), this Court found such a public exigency, based on the unique history of the federal government's dealings with the Choctaw and Cherokee Indians. *Choctaw, supra,* at 622-626. The court found the requisite "very plain" intent in the fact that the land was conveyed to the Indians in fee simple and in the treaty provision that the land would never be "embraced in any Territory or State." *Choctaw, supra,* at 634-635.[23]

The facts in this case are totally inapposite to *Choctaw* because in this case: (1) The entire region which was originally made a part of the Crow Indian Reservation was not conveyed to the Crow Tribe;[24]

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[23] In a recent case, this Court disparaged a contention that an Indian tribe held title to a navigable river bisecting its reservation despite treaty language nearly identical to that relied upon by the lower court in this case. *Puyallup Tribe, Inc. v. Washington Game Department,* 433 U.S. 165, 174, n. 12 (1977).

[24] The guarantees of tribal exclusivity which were persuasive in *Choctaw* are totally absent here. Instead of fee simple title only "use and occupation" were conveyed. Art. 2, Treaty of May 7, 1868, 15 Stat. 650. Art. 6 of the treaty contemplated allotment of lands to the Indians. *Id.,* at 651. Subsequently, vast areas of land were ceded to the United States. Act of April 11, 1882, 22 Stat. 42; Act of July 10, 1882, 22 Stat. 157; Act of March 3, 1891, 26 Stat. 989; Act of February 12, 1889, 25 Stat. 660; Act of June 4, 1888, 25 Stat. 167; Act of April 27, 1904, 33 Stat. 352. Finally, on June 4, 1920, 41 Stat. 751, the Crow

(2) there were no assurances of self-government extended to the Crow Tribe of Indians; (3) there were no pledges to the Crow that their new homeland would never be part of any state; and finally, (4) fee simple title to the land was retained by the United States, and thus, the Indian title was one of use and occupancy as opposed to fee simple.[25]

When Montana became a state in 1889, the fee to the Big Horn River was owned by the United States. The rationale of *Holt* is that "under the constitutional principle of equality among the several states, the title to Mud Lake then passed to the state * * * if the bed had not already been disposed of by the United States." *Holt, supra,* at 55.

This "constitutional principle of equality" upon which *Holt* was dependent has been given renewed vitality in *Oregon v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977). *Corvallis* holds that the State of Montana, upon its admission to the Union, received absolute title to the beds of navigable waterways within its boundaries:

> "Citing *Martin v. Waddell,* 16 Pet. 410, 10 L.Ed. 997 (1842), the Court noted that the original States held the 'absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.' How.,

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Allotment Act was passed and out of a total reservation land area of 2,282,764 acres, only 395, 591.49 acres remain as tribal lands. By the same Act, the State of Montana received fee simple title to Sections 16 and 36 as school grant lands for a total of 44,804.82 acres. *Id.,* 41 Stat. 756. Some of these school grant lands straddle the Big Horn River and encompass its bed and banks. 457 F.Supp. at 602 (Appendix B,p. 34.)

[25] The "use and occupancy" title of the Crow is nearly identical to the title held by the Chippewas which was insufficient to convince this court to vest title in Mud Lake in that tribe. *United States v. Holt State Bank, supra; Minnesota v. Hitchcock,* 185 U.S. 373 (1902).

at 229, 11 L.Ed. 565. The Court then concluded:

'First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy * * * *Id., at* 230, 11 L.Ed. 565.'

In so holding, the Court established the absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party was capable of defeating.

Thus under Pollard's Lessee the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself." (Emphasis supplied.) 429 U.S. at 373, 374.

The Enabling Act admitting the State of Montana to the Union stated that it was "to be admitted into the Union on an equal footing with the original states."[26] The lower court completely disregarded the equal footing doctrine established by this court in *Pollard's Lessee v. Hagan,* 3 How. 212 (1845), reconfirmed in *Corvallis* and predicated its decision upon a thin tissue of treaty language.

The likely result of allowing the lower court's decision to stand will be to eventually divest Montana and other states of title to the beds of countless

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[26] Act of February 22, 1889, 25 Stat. 676.

navigable rivers and lakes throughout the western United States. Some states would be deprived of the beds of most of the navigable waters within their boundaries.[27] This would virtually eviscerate the equal footing doctrine in these states — a result, we believe, this Court did not countenance by its *Choctaw* decision.

2. THE LOWER COURT'S DECISION CONFLICTS WITH THIS COURT'S RECENT HOLDING IN *WILSON V. OMAHA INDIAN TRIBE*, ____U.S.____, 61 L.ED.2d 153 (1979).

The District Court held Montana owned title to the Big Horn River to high-water mark,[28] although the State had contended riparian ownership extended to low-water mark. Since the judgment granted the State ownership to the *entire riverbed*, no appeal was taken from that holding. However, Montana continued to assert to the lower court that a riparian owner owns to low-water mark under state law applied as a federal rule.[29] Prior to petitioning for rehearing, the lower court, following its decision in *Finch, supra*, held the Tribe owned to high-water mark. Montana petitioned for rehearing, citing *Wilson v. Omaha Indian Tribe, supra*, for the proposition that the federal court, in fashioning a federal rule, should refer to state law.

In denying rehearing, the court reasoned that a

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[27] To give one example, the Treaty with the Sioux bands which created the Great Sioux Reservation, covering all of South Dakota west of the Missouri River was negotiated and signed at the same place and within one week of the Crow treaty construed below. It contained all of the provisions which the court below found to be determinative. 2 Kapp. 770, 774.

[28] 457 F.Supp. at 611 (Appendix B, p. 54).

[29] Respondent's Brief to Ninth Circuit, pp. 57-60.

contrary holding would frustrate "federal policy and functions." (Appendix A. p. 25) But in *Wilson*, this court held that questions of riparian ownership would be governed by the State rule in two different contexts: First, when the subject land was granted away by patents,[30] and secondly, when the subject land was still within the confines of a reservation.[31]

This case most nearly approximates the first situation exemplied by *Oklahoma v Texas*, 258 U.S. 574 (1922), and its progeny, [32] for here, the United States issued patents "granting former reservation lands."[33] As this court said in *Wilson:* "[I]n this case several hundred acres of land within the Barrett survey are held in fee, and concededly are not Indian property. These tracts would not be governed by the federal rule announced by the Court of Appeals." 61

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[30] *Wilson, supra*, 61 L.Ed.2d at 168-169.

[31] *Wilson, supra*, 61 L.Ed.2d at 170-173.

[32] *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88-89 (1922); *United States v. Champlin Refining Co.*, 156 F.2d 769, 773 (10th Cir., 1946), aff'd 331 U.S. 788-789 (1947); *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206, 209-210 (1942); compare *Whitaker v. McBride*, 197 U.S. 510 (1904). The rule articulated in the cited cases has been consistently applied in similar controversies-some involving former Indian lands. See, e.g., *Hardin v. Shedd*, 190 U.S. 508, 509 (1902); *Shiveley v. Bowlby*, 152 U.S. 1, 45 (1894); *Hardin v. Jordan* 140 U.S. 371 (1891); *Packer v. Bird*, 137 U.S. 661 (1891); *Choctaw & Chickasaw Nations v. Board of County Commissioners*, 361 F.2d 932, 933 (10th Cir., 1966); *Choctaw & Chickasaw Nations v. Seay*, 235 F.2d 30, 35 (10th Cir., 1956); *Herron v. Choctaw & Chickasaw Nations*, 228 F.2d 830, 832 (10th Cir., 1956); *United States v. Elliott*, 131 F. 2d 720, 723 (10th Cir., 1942); *Shore v. Shell Petroleum Corp.*, 55 F.2d 696, 202, aff'd 60 F.2d 1, 2 (10th Cir., 1932); *United States v. Hayes*, 20 F.2d 873 889-890 (8th Cir., 1927), cert.den. 275 U.S. 555; *United States v. Heinrich*, 12 F.2d 938, 939 (D.Mont., 1926). While as pointed out in *United States v. Oregon*, 295 U.S. 1, 27-28 (1935), the construction of federal grants is initially a federal question, the federal courts traditionally defer to state rules of construction.

[33] *Wilson, supra*, footnote 18, 61 L.Ed.2d at 169.

L.Ed.2d at 170-171.

But even were the court to apply the second *Wilson* rule, state law would still control because there is no need for "a uniform national rule" to determine riparian ownership, and it is an area in which the State has a substantial interest "in having their own law resolve controversies such as these." 61 L.Ed.2d, *supra*, at 170.

Montana law declares that an owner of land riparian to navigable waters owns to low water mark "except where the grant * * * indicates a different intent." 70-16-201, Montana Code Annotated; *Fawcette v. Dewey Lumber Co.*, 82 Mont. 250, 266 P. 646 (1928); *C. F. Mettler v. Ames Realty Co.*, 61 Mont. 152, 201 P. 702 (1921); *Gibson v. Kelly*, 15 Mont. 417, 422, 39 P. 517 (1895). The patent under which the state owns its riparian land "indicates (no) different intent."[34] The lower court's error in failing to properly interpret and apply *Wilson* in this case merits review.

3. THE COURT'S DECISION EXTENDING INDIAN CONTROL OVER NON-INDIAN FEE LANDS, IS IN DIRECT CONFLICT WITH THE PRINCIPLES ENUNCIATED IN *OLIPHANT V. SUQUAMISH INDIAN TRIBE* AND THE PROVISIONS OF 18 U.S.C. §1165.

Relying upon those treaty construction standards

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[34] The granting clause in Muskrat's patent states: "NOW KNOW YE That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, there-unto belonging,unto the said claimant and to the heirs and assigns of the said claimant forever, and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States."

which require treaties and Indian laws to be construed liberally in favor of the Indians, and relying upon the fact that Congress had not specifically conveyed hunting and fishing rights to non-Indians, the lower court held that the Crow treaties "augmented" by 18 U.S.C., §1165, conferred in the Tribe authority to regulate non-Indian hunting and fishing on fee lands in two respects: (1) non-distriminatory regulation of resident fee owners; and (2) total regulation, including proscription of non-resident fee owners.[35]

In extending civil regulatory authority over non-Indians on fee lands, the lower court ignored the treaty language which implicitly divested the Tribe of jurisdiction over non-Indians and ignored the Tribe's own interpretation of its authority.[36]

Moreover, the legislative history of 18 U.S.C., §1165, clearly reflects the fact that Congress was concerned that Indians did not have the protection of any law which gave them control over *their lands. Oliphant, supra,* 435 U.S. 191, at pp. 205-206. Section 1165 was passed to fill that vacuum. However, Congress was cognizant of those decisions holding that "extinguishment" of Indian title can effectively divest Indian and federal jurisdiction[37] and impose state rules to measure the incidents of ownership at-

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[35] 604 F.2d at 1165-1166 (Appendix A, pp. 7-8).

[36] See footnote 20, *supra.* Joe Medicine Crow, Tribal Historian, testified that a fee patent conveyed to the owner hunting and fishing privileges and the right to regulate the same. Tr. 150.

[37] See, e.g., *Bates v. Clark,* 95 U.S. 203, 208 (1877); *Ex Parte Crow Dog,* 109 U.S. 556, 561 (1883); *Clairmont v. United States,* 225 U.S. 551, 557 (1911). See also Montana's Enabling Act, *supra,* p. 4 and cf. *Ward v. Racehorse,* 153 U.S. 504 (1895), and *Draper v. United States,* 164 U.S. 240 (1896).

taching to federal patents.[38] Thus, it specifically eschewed an opportunity to expand the scope of §1165 to include 18 U.S.C. §1151, "Indian Country." See Appendix J.

As articulated by this court in *McClanahan v. Arizona Tax Court*, 411 U.S. 164, 172 (1973), the "trend" is away from the "idea of inherent Indian sovereignty" and "toward reliance on federal preemption." Section 1165 is indicative of this trend, because trespass is only punishable with reference to §1165 lands — Indian lands. If indeed Indian tribes possess "inherent sovereignty," that sovereignty must attach to their own lands — yet Congress felt it necessary to protect those lands wherein their sovereignty would reign most supreme but did not extend it to lands where tribal authority would be challenged.

The lower court's holding that §1165 augmented the 1868 treaty also violates the cardinal rules of statutory construction. In all cases involving construction of a statute, this court relies chiefly upon the language of the Act itself.[39] The language of §1165 refers only to land belonging to an Indian tribe, Indian trust lands, or lands of the United States "reserved for Indian use."

If the language is ambiguous, the court then must look to the legislative history of the Act.[40] However,

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[38] *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677 (1974); *Packer v. Bird*, 137 U.S. 661, 669 (1891); *Antler v. Land Co. of Wyola*, 507 F.2d 940, 943 (9th Cir., 1974), cert. den. 421 U.S. 992.

[39] *Chemehueui Tribe v. F. P. C.*, 420 U.S. 395, 400 (1975); *United States v. Standard Brewery*, 251 U.S. 210, 217 (1920); and *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917).

[40] *Chemehueui Tribe, supra*, at 405; *Perry v. Commerce Loan Co.*, 383 U.S. 392, 399-401 (1966).

as noted above, Congress rejected a proposal to expand §1165 to include non-Indian fee lands or to make it co-extensive with the definition of "Indian Country" contained in 18 U.S.C., §1151. *Oliphant, supra;* letter from Indian Commissioner, John Crow, to John W. Cragun, Appendix J.

If the "primary" evidence of congressional intent is still not conclusive, then the court has consulted "secondary sources," and an interpretation "made at or soon after the time of enactment" must be "given special consideration since it was made at a time when the circumstances leading up to enactment of the statute are well known."[41]

The record in this case reflects uniform interpretation of §1165 by federal and state authorities, including written memoranda by Interior solicitors[42] and cautionary admonitions to the Tribes[43] that §1165 did not embrace non-Indian owned fee lands.

Since the notion of "Indian sovereignty" has given way to "federal preemption," the lower court was clearly in error in holding that the 1868 treaty "augmented" by §1165 supported Resolution 74-05. The clear intent of Congress as expressed in the Act itself, as reflected in congressional history, and finally as interpreted by federal agencies, should have inexorably led the lower court to affirm the district court's jurisdictional judgment. The lower court's total approval of Resolution 74-05 vests the Tribes with authority specifically withheld by Congress and totally inconsistent with "their

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[41] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). See also *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-142 (1976).

[42] Fish and Game Exhibit 9.

[43] Crow Tribe Exhibit 71-rr.

dependent status."[44] For that reason, review is essential.

4. THE LOWER COURT'S APPROVAL OF THE TRIBE'S SUMMARY AND ARBITRARY REGULATION OF A NON-MEMBER FEE OWNER'S HUNTING AND FISHING PRIVILEGE SHOCKS THE CONSCIENCE AND VIOLATES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Resolution 74-05 operates only against non-tribal persons. Tribal members are free to hunt and fish free of any tribal, state, or federal regulation. The effect of the lower court's decision was to approve confiscation of a valuable property right which would have normally attached to a non-Indian's fee land — the privilege of reducing to possession game and fish which abounds thereon.[45] This holding is directly contrary to the principles underlying recent Supreme Court cases.

The 19th century fiction that a state owns title to wild fish, animals, and birds within its boundaries was recently dissipated by this court. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284-285 (1977); *Hughes v. Oklahoma*, ____U.S.____, 60 L. Ed.2d 250, 263 (1979). A similar conclusion was drawn by the Department of the Interior vis-a-vis Indian tribes. 78 I.D. 101 (1971). During 1976, the

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[44] *Oliphant, supra*, 435 U.S. at 207-208.

[45] As noted in *Wlson, supra*, and cases cited at page 18, *supra*, the incidents of ownership attaching to a federal patent are measured by state law. In Montana, a landowner posesses an exclusive right to hunt on his land and to fish non-navigable streams and navigable streams to low-water mark which flow through his land. *Herrin v. Sutherland*, 74 Mont. 587, 601, 241 P. 328 (1925); cf. 70-2-111, M.C.A. This court has likewise recognized an exclusive riparian fishery right. *Hardin v. Jordan*, 140 U.S. 371, 384 (1890); *Holyoke Co. V. Lyman*, 15 Wall. 500, 512-513 (1873).

opinion was withdrawn and not replaced.[46]

This is not a case in which non-residents seek to acquire a state's fish and game, such as this court studied in *Baldwin v. Montana Fish & Game Com'n*, 436 U.S. 371 (1978). Landowners (whether residents of the reservation or not), their guests, and employees living on or visiting the reservation are citizens of the State of Montana, within which the Crow Reservation is located and own land there pursuant to federal law and federal patents. See footnotes 32 and 34, *supra*.

The privilege to reduce to possession fish and game located on one's land is recognized as a property right under Montana law. *Herrin v. Sutherland*, 74 Mont. 587, 601, 241 P. 328 (1925). Both the Tribe and the United States have so contended in this case.[47] But regardless of whether classified as a "right" or a "privilege," it is still a right subject to constitutional protection. Compare *Graham v. Richardson*, 403 U.S. 365, 374 (1971). Neither the district court nor the lower court found that Resolution 74-05 was predicated upon any legitimate tribal interests such as conservation.[48] Compare *Douglas v. Seacoast Products, Inc., supra*, 431 U.S. at 285.

This court held in *Baldwin, supra*, 436 U.S. at 390-391, that to pass Fourth and Fourteenth Amend-

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[46] A similar withdrawal without public comment was noted by this court in *Oliphant v. Suquamish Indian Tribe, supra*, 435 U.S. 191, 201, note 11 (1978).

[47] United States brief to Ninth Circuit, p. 13; and Crow Tribe brief, p. 46.

[48] The State of Montana was instrumental in stocking reservation streams with fish and the land with up-land game birds. Montana-planted-game migrate into the reservation, and the elk herd migrates into and out of the reservation. 457 F.Supp. at 605. Appendix B, p. ____.

ment constitutional muster, regulation must be "rationale." Compare *Hughes v. Oklahoma, supra,* 60 L.Ed.2d at 262-263. Rationality in *Baldwin* was confirmed because non-resident hunters create greater enforcement problems. 436 U.S. at 391. But the lower court found no such rationality supporting Resolution 74-05. It relied solely upon exclusivity guaranties included within the Treaty of 1868 augmented by 18 U.S.C. §1165. However, the lower court's rationale failed to properly recognize that exclusivity had been significantly diluted by the 1887 and 1920 Allotment Acts and 18 U.S.C. §1165 was not co-extensive with reservation boundaries.

Although this Court stated that neither the Fifth or Fourteenth Amendments[49] operate upon Indian tribes' powers of self-government (*Santa Clara Pueblo v. Martinez,* 436 U.S.. 49, 56 (1978)), it has also recognized the rights of its citizens to be free from "unwarranted intrusions on their personal liberty." *Oliphant v. Suquamish Indian Tribe, supra,* 435 U.S. at 210. The lower court in an earlier case held that while the Fourteenth Amendment might not apply to tribal courts; nevertheless, even vis-a-vis a tribal member, Indian regulation may be so "summary and arbitrary as to shock the conscience of the federal court or goes beyond the scope of authority contemplated" by treaty. *Settler v. Yakima Tribal Court,* 419 F.2d 486, 489 (9th Cir., 1969) cert.den. 398 U.S. 903 (1970).

Resolution 74-05 was submitted to the Bureau of Indian Affairs for review, and the Area Director advised the Tribe that 18 U.S.C. §1165 did not encompass fee patented lands within the reservation. Crow

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[49] Fourteenth Amendment protections are embraced within the Fifth. *Schneider v. Rusk,* 377 U.S. 163 (1964); *Shapiro v. Thompson,* 394 U.S. 618, 641-642 (1969); *Washington v. Davis,* 426 U.S. 229 (1976).

Tribe Exhibit 71-rr. At that time, the Area Director should have advised the Tribe that the resolution was also beyond the authority of the Tribe to enforce. By not addressing that matter, in essence, federal approval was given to the resolution. Moreover, tribal wardens have been deputized by the federal government and enforce Resolution 74-05 as agents of the federal government. Transcript, p. 252-253; compare *Santa Clara Pueblo v. Martinez,* 436 U.S., *supra,* at 56, n. 7; *Settler v. Yakima Tribal Court, supra,* 419 F. 2d at 489; and *Colliflower v. Garland,* 342 F. 2d 369 (9th Cir., 1965). Thus, in essence, federal agents enforce a patently discriminatory and confiscatory regulation so "summary and arbitrary" as to "shock" one's conscience and violate the Fifth Amendment. Approbation of such a resolution enforced by federal sanctions merits review.

Finally, the lower-court-created dichotomy between resident and non-resident fee holders was clearly an effort to compromise or dilute the impact of approving a facially discriminatory and confiscatory resolution. In fashioning this type distinction, the lower court utterly failed to recognize that property rights attaching to fee patents are not salesroom "extras." The non-resident fee owner is still a citizen of Montana and the United States. His title is derived from the Federal Government, and he owns his land not by virtue of where he lives, but by virtue of a federal patent. With that patent are conveyed all concomitant property values which are attached to land by state law. See page 21 and footnote 38, *supra.* These property values cannot be emasculated by an accident of residence. The creation of such an inventive classification is alone sufficient to merit review.

5. THE LOWER COURT'S DECISION APPROVING RESOLUTION 74-05 VIOLATES THE INDIAN CIVIL RIGHTS ACT.

Resolution 74-05 only proscribes hunting and fishing by non-members within the reservation. As stated at page 25, *supra*, neither the district court nor the lower court found any facts supporting the need for its enactment. Fish and some types of game are stocked by the state. Virtually all of the trout found in the Big Horn River are exotic, not indigenous, species. Big game migrate into and out of the reservation. 457 F.Supp. at 605 (Appendix B,p. 39.) Indians and non-Indians alike have ignored bag limits and good rules of game conservation. Transcript 257, 258, 313, 324-325. Thus, there was absolutely no supporting basis upon which the flagrantly discriminatory resolution could be predicated.

25 U.S.C.§1302(8) prohibits an Indian tribe in exercising powers of "self government", from denying "any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; * * *."

The key words, of course, are "powers of self government" and "persons within its jurisdiction." The congressional history of the Indian Civil Rights Act (ICRA) as studied by this Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61-71 (1978), does not support the conclusion that the ICRA encompassed non-Indians within its protections. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, declares that Indian tribes have been divested of criminal jurisdiction over non-Indians, but nevertheless, the court commented that the ICRA extended certain procedural rights to "*anyone*" tried in tribal courts. 435 U.S. at 212. *Oliphant, supra*, and *United States v. Wheeler*, 435 U.S. 313 (1978), also hold that other powers of Indian tribes have been both expressly

and implicitly divested.

The Treaty of 1868 specifically expresses the diminution of Crow authority over non-Indians. The Allotment Acts of 1887 and 1920 are the legislative means by which Indian title to lands within the reservation have been "extinguished."[50] Thus, the requisit jurisdiction supporting ICRA protection may be lacking. However, circuit courts have held that the ICRA does include non-Indians. See, e.g., *Dry Creek Lodge, Inc. v. United States,* 515 F.2d 926, 933-934 (C.A.10th, 1975); *Berry v. Arapaho & Shoshone Tribes,* 420 F.Supp. 934, 939 (D.Wyo., 1976). If it does, then Resolution 74-05 is discriminatory and confiscates property rights. If it does not, then this Court's interest in protecting all of its citizens from "unwarranted intrusions upon their liberties" expressed in *Oliphant, supra,* 435 U.S. at 210, would require that the lower court's decision be reviewed to eliminate conflicting decisions and to ensure that non-Indian property rights within a reservation are protected.

6. THE LOWER COURT'S DECISION VIOLATES RULE 52(a), FEDERAL RULES OF CIVIL PROCEDURE.

In reviewing questions involving whether navigable waters are owned by the several states, *Martin v. Waddell,* 41 U.S. 366, 417 (1842); *Skokomish Indian Tribe v. France,* 320 F.2d 205, 212 (9th Cir., 1963); whether Indian reservations have been diminished, *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 604-605 (1977); and whether tribal jurisdiction has given way to state jurisdiction, *Puyallup Tribe, Inc. v. Washington Game Department,* 433

[50] Montana's authority over Indian lands limited only until title "extinguished." Enabling Act, p. 4, *supra.*

U.S. 165, 175 (1977), this court and the lower court have carefully scrutinized not only federal legislation and treaties, but also how the respective parties have interpreted and applied such legislation and treaty language.

The district court, in arriving at his decision, said: "an extensive and laudatory record has been made." 457 F.Supp. 600 (Appendix B, p. 29). He felt he was not bound by the lower court's decision in *United States v. Finch*, 548 F.2d 822 (Appendix C), because this Court had vacated the lower court's judgment in that case and directed that court to dismiss the appeal (433 U.S. 676 (1978)), and was confident that the lower court "will find, on the record made here, that the bases for its earlier decision are not supported by the record." 457 F.Supp. 600-601, n. 1 (Appendix B, pp. 29-30).

The district court made extensive findings of fact which bore upon the issues of river ownership.[51] He also studiously examined how fish and game management within the reservation had been administered in the past, including a study of the federal-state-Indian jurisdictional trichotomy.[52]

The lower court has held that district court fact findings are binding upon its appellate review power unless clearly erroneous.[53] Rule 52(a), Federal Rules of Civil Procedure, as interpreted by this Court, en-

[51] E.g., that the Tribe did not use the Big Horn River for travel nor was the Tribe dependent upon fish or fishing. 457 F.Supp. 602. (Appendix B, pp. 32-33.) Compare *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Skokomish Indian Tribe v. France, supra*, 320 F.2d at 212.

[52] See, e.g., 457 F. Supp. 604-605, 610 (Appendix B, pp. 38-39, 52-53).

[53] *Skokomish Indian Tribe v. France, supra*, 320 F.2d at 212; *Beaver v. United States*, 350 F. 2d 4, 7 (9th Cir., 1965) cert.den. 382 U.S. 937 (1966).

joins an appellate court from setting aside a district court's findings unless "clearly erroneous."[54] Nevertheless, the lower court totally ignored such factual findings in this case and reversed upon issues which were clearly dependent upon those findings. The lower court did not characterize any of the district court findings as insubstantial, incredible, or against the great weight of the evidence, nor would the record support any such characterization. The lower court's failure to give proper deferrance to the district court's findings in this case merits review.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

RESPECTFULLY SUBMITTED THIS ____ day of January, 1980.

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[54] *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949); *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 495-496 (1950); *United States v. Oregon State Medical Society*, 343 U.S. 326, 332 (1952).

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